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State of Utah v. Brady C. Bullock : Brief of Appellant

Utah Court of Appeals

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3/21/88

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff/Respondent,	)	Case No. 870332-CA
	)	
v.	)	
	)	
BRADY C. BULLOCK,	)	
	)	
Defendant/Appellant.	)	

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APPELLANT'S BRIEF

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JURISDICTION

Jurisdiction in this Court is proper pursuant to the Constitution of Utah, Article I, Section 12; Utah Code 1987-1988, Sections 77-35-26(13) and 77-1-6(g); and Rules 3 and 4, Rules of the Utah Court of Appeals, this being an appeal from the final orders of a Circuit Court, including the judgment of conviction in a criminal case and, in addition, where the constitutionality of a statute is at issue.

NATURE OF THE PROCEEDINGS

This is an appeal from the final orders and judgments of the Fifth Circuit Court, Salt Lake Department, Salt Lake County, Utah to wit:

a. A judgment of conviction of Driving Under the Influence in violation of Section 41-6-44, Utah Code Annotated, 1985, as amended, a class "B" misdemeanor;

b. Denial of Defendant/Appellant's pre-trial Motion(s) to Dismiss/Suppress evidence.

STATEMENT OF THE ISSUES

1. Is Section 41-6-44(8), Utah Code Annotated, unconstitutional on its face and/or as applied herein?

2. Was the trial court's denial of Appellant's pre-trial motions to dismiss and/or suppress evidence on constitutional grounds an abuse of discretion which deprived Appellant of constitutionally protected rights?

3. Did the trial court apply the appropriate burden of proof in denial of Appellant's said pre-trial motions?

4. Was the evidence against Appellant admitted at trial the product of unconstitutional search, seizure and/or prohibition against involuntary self-incriminating statements and thereby tainted so as to deny Appellant the due process of law at trial?

5. Was the said evidence derived from an unlawful arrest and therefore rendering the trial court's jurisdiction over Appellant unconstitutionally void ab initio?

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Constitution of Utah

Article I

Section 12. [Rights of Accused Persons.]

> . . . The accused shall not be compelled to give evidence against himself; . . .

Section 14. [Unreasonable Searches Forbidden - Issuance of Warrant.]

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated; . . .

2. Constitution of the United States

Amendment Four

> . . . The accused shall not be compelled to give evidence against himself; . . .

Amendment Five

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, . . .

3. Utah Code Annotated, 1953, as amended; (Also, Utah Code, 1987-1988).

Section 41-6-44(1)(a)

> It is unlawful . . . for any person to operate . . . a vehicle . . . if the person is under the influence of alcohol . . . to a degree which renders the person incapable of safely operating a vehicle.

Section 41-6-44(8)

> A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

Section 41-6-44.10(2)(a)

> If the person has been placed under arrest and has then been requested by a peace officer to submit . . . chemical tests . . .

Section 77-7-1. "Arrest" defined - Restraint allowed.

> An arrest is an actual restraint of the person arrested or submission to custody. The person shall not be subjected to any more restraint than is necessary for his arrest and detention.

Section 77-7-2. By peace officers.

> A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:
> (1) for any public offense committed or attempted in the presence of any peace

officer; "presence" includes all of the physical senses or any device that enhances the acuity, sensitivity, or range of any physical sense, or records the observations of any of the physical senses;

(2) when he has reasonable cause to believe a felony has been committed and has reasonable cause to believe that the person arrested has committed it;

(3) when he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:

(a) flee or conceal himself to avoid arrest;

(b) destroy or conceal evidence of the commission of the offense; or

(c) injure another person or damage property belonging to another person.

Section 77-7-3. By private persons.

A private person may arrest another:

(1) For a public offense committed or attempted in his presence; or

(2) When a felony has been committed and he has reasonable cause to believe the person arrested has committed it.

Section 77-7-15. Authority of peace officer to stop and question suspect - Grounds.

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

STATEMENT OF THE CASE

A. NATURE OF CASE

This is an appeal from a conviction for the class "B" misdemeanor criminal offense of Driving Under the Influence (of Alcohol) in violation of the Utah Code, Section 41-6-44. (DUI.)

B. COURSE OF PROCEEDINGS

Appellant was arrested for DUI on October 4, 1986, in Salt Lake County, Utah, by Salt Lake County Deputy Sheriff E. Robbie Russo and thereafter charged by formal Information with said charge before the Honorable Joanne Rigby, Justice of the Peace, 6th Precinct Court, Salt Lake County. (Case No. 1759104A).

A judgment of conviction and sentence were entered in said Precinct Court on December 10, 1986, for the lesser offense of "Reckless Driving" pursuant to a plea bargain arrangement and plea.

Appellant hired present counsel and raised the issue of the constitutionality of his arrest and subsequent prosecution with said court and therein timely filed his Notice of Appeal (January 7, 1987) pursuant to 77-35-26, U.C.A., requesting a de novo trial in the Fifth Circuit Court.

Appellant was arraigned in the Circuit Court on January 29, 1987.

Appellant filed a pre-trial Motion to Dismiss/Suppress (see infra) on or about March 19, 1987, which was taken under

advisement by Judge Gibson who, on April 15, 1987 denied Appellant's Motion(s) without the benefit of Findings of Fact or Conclusions of Law, oral or written.

Trial by jury was held on June 15, 1987. Appellant again raised substance of motions before the first witness was sworn which was summarily denied by Judge Gibson.

The state called five witnesses: two civilians who witnessed Appellant operating a vehicle in a manner they perceived as unsafe due to alcohol impairment; Deputy Russo and his on-scene "back-up" officer; and the breath-test machine technician. The state rested following admission of breath test results over objection of Appellant.

Appellant moved to dismiss on those grounds set forth hereinafter after having unsuccessfully objected during examination to admission of testimony and evidence which is hereinafter raised on appeal. Appellant's Motion to Dismiss was denied. Appellant rested.

The case was argued and submitted to the jury which later returned with a verdict of guilty.

C. DISPOSITION

Following the June 15, 1987 jury verdict, sentence was imposed and final judgment of conviction entered by Judge Gibson on August 28, 1987.

D. RELEVANT FACTS

Since the issues on appeal relate solely to the unlawful actions of the police officer in confronting, detaining, questioning and arresting Appellant, it would be helpful to present this Court with a summary of the general facts giving rise to Appellant's arrest, the facts known to the officer prior to questioning and then prior to the eventual arrest. A summary of additional facts adduced at trial, although not material to the issues on appeal, are presented for clarity.

1. Generally

About 11:00 p.m., October 4, 1986, in Salt Lake County, Utah, Mr. and Mrs. Roger and Susan Mott were proceeding eastbound on 4500 South (Susan driving) when a pick-up truck driven by Appellant turned in front of them in pulling into a 7-11 Store parking lot, nearly causing a collision. (Tr., 49.)

The Mott vehicle followed. Mr. Mott angrily confronted Appellant, berating him for his driving actions and demanding to know if he (Appellant) was drunk. (Tr., 61.)Receiving no response, Mr. Mott informed Appellant that he was going to call the police. (Tr., 61.)

Mr. Mott then entered the 7-11 and requested a sales clerk notify the Salt Lake County Sheriff's Office of the incident. The sales clerk called the sheriff's dispatcher and apparently provided the truck's license number and presumably reported the driver as a suspected "drunk driver". (The record

is silent as to what facts Mr. Mott provided to the clerk and as to what the clerk told the sheriff's dispatcher.) (Tr., 63.)

Simultaneous with Mr. Mott's entering the 7-11, Appellant departed the parking lot and drove into a nearby residential area. The Motts then conducted a search of the area and located the suspect vehicle parked in front of a private residence about three blocks away. (Tr., 53.) The residence was also the address listed for the vehicle's registered owner, Mr. Brian Scoffield. (Tr., 88.)

The Motts then returned home, took care of some family matters and Mr. Mott made a call of his own to the sheriff's office, adding only that the suspect vehicle was located at the Scoffield address. The Motts then drove to the said address, arriving after the deputies. (Tr., 53, 54, 56, 84.) The amount of time which passed from the driving incident and the confrontation between Appellant and the deputies was somewhere between 30 minutes (Tr., 54, testimony of Mrs. Mott) and 50 minutes (Tr., 91, Deputy Russo).

2. Pre-Questioning/Detention Facts Known to Deputy Russo

Upon arrival at the Scoffield residence Deputy Russo had only been advised by the sheriff's dispatcher that a "possible drunk driver" complaint had been called in and the vehicle description and location of same. (Tr., 85, 86, 103, 104).

He was relying entirely upon a hearsay report of an unknown civilian complainant and had no information of any facts giving rise to the complaint. (Tr., 85, 86, 103.)

Upon arrival at the Scoffield residence, Russo and other deputies entered onto the private property without asking for or receiving any consent to do so. (Tr., 87-89.) Mr. Scoffield, Appellant and another man were standing in the driveway next to the home. Russo first approached Mr. Scoffield, identified him and asked him if he had earlier been driving the truck. He said that he had. (Tr., 88, 89.) While Russo continued questioning Scoffield, the Motts arrived and Mr. Mott came onto the private property and advised Russo that Scoffield was not the suspect and pointed out Appellant who was standing some 40 to 50 feet further up the driveway. (Tr., 66.)

Mott also apprised Russo of the near-collision driving pattern of Appellant but provided no further facts. (Tr., 105.)

Russo then approached Appellant and asked for identification to ascertain his name and address. Appellant complied. (Tr., 90.) Russo then asked if Appellant had earlier driven the vehicle and if he had been drinking. Appellant said he had drunk three beers and had driven the suspect vehicle. (Tr., 92.) However, the record is silent as to when Appellant had driven the truck, whether or not he had drank after he drove or when prior to driving he had drank.

Russo also noticed a "moderate" odor of alcohol on Appellant. (Tr., 90.)

Based therefore on the hearsay of a private citizen as to the element of driving (and negligent driving pattern) and upon the triple hearsay report of a "possible drunk driver" (from citizen to 7-11 clerk to dispatcher to Russo) and upon the odor of alcohol (30 to 50 minutes later) and upon Appellant's admission to drinking at some unknown earlier time and driving at some unspecified time, Russo asked Appellant to "submit" to field sobriety tests. Appellant submitted. (Tr., 92.)

Russo then removed Appellant to another location and had him perform four agility tests which were indicative of impairment, per Russo's opinion. (Tr., 98, 106.)

Russo admitted that he never informed Appellant that Appellant was under no obligation to attempt the field tests (even though Russo knew that) and Russo further admitted that he requested the tests in order to gather evidence of Appellant's impairment. (Tr., 115, 116.)

Further, Russo testified that he did not advise Appellant of his Miranda rights until after his arrest. (Tr., 115.)

He arrested Appellant immediately following the field tests. (Tr., 98.) Some 20 minutes later (and some 50 to 70 minutes following the reported act of driving) Appellant was given a breath test resulting in a blood-alcohol reading of .11%.

3. Additional Facts

Although Mr. and Mrs. Mott testified at trial to such observations as Appellant's intoxicated appearance, unresponsive demeanor, further egregious driving pattern upon departing the 7-11, odor of alcohol and empty beer and whiskey containers in the truck bed, those "facts" are not relevant since none were known to Russo until after the arrest and, in fact, not until trial for the most part. (Tr., 105, 106.)

SUMMARY OF ARGUMENT

Appellant will argue that his prosecution and attendant conviction herein were void ab initio due to his arrest being based upon unlawfully obtained evidence in violation of his rights to be protected from unconstitutional intrusions by police officers as to search and seizure and the obtaining of statements and testimonial evidence of an incriminating nature without benefit of Miranda warnings.

Appellant also argues that the arrest was based upon insufficient probable cause irrespective of the admissibility of the evidence and that the court should have therefore dismissed the charge on jurisdictional and due process grounds prior to trial and/or prior to submission to the jury.

Appellant not only argues that the admission of the evidence over his motions and objections denied him due process but further argues that the statutes pertaining to his detention were violated and that the statute which purports to allow for DUI arrests absent the "presence" requirement of the arresting

officer is unconstitutional on its face and as applied in this instance.

ARGUMENT

Since a trial court cannot obtain jurisdiction derived from an illegal arrest and cannot permit evidence to be admitted which is tainted by the prior unlawful search, seizure or questioning of a suspect, this case should be analyzed to determine whether any or all of the evidence against Appellant was the fruit of a "poisoned tree" and, if so, at what point the taint attached. It is at the point that all after acquired evidence should have been excluded.

Evidence gained during an illegal arrest is inadmissible. Wong Sun v. United States, 371 U.S. 471 (1963). All evidence obtained following the unlawful invasion of rights is also inadmissible.

1. THE TAINT ATTACHED AT THE MOMENT THE DEPUTIES ENTERED ONTO PRIVATE PROPERTY

A lengthy discussion of Fourth Amendment rights is not necessary. Utah law does not permit an officer to confront a person for questioning except in a public place. (See argument re: 77-7-15, infra.)

The only perceivable exceptions to the absolute requirement of a warrant before entering private property are: consent, hot pursuit and probable cause coupled with exigent circumstances.

a. Consent. The record shows that consent was neither requested nor given. The officers' entry was merely acquiesced to. Consent must be voluntary and informed. Mere submission to authority is insufficient. It is the prosecutor's burden to prove waiver. Bumper v. North Carolina, 391 U.S. 543. Absent proof, there is a presumption against waiver of a constitutional rights. Johnson v. Zerbst, 304 U.S. 458.

b. Hot Pursuit. This exception requires what it implies, pursuit by an officer of a fleeing violator justifying a continuing and unbroken action allowing the orficer to follow the offender onto private property. Utah law clearly rejects this exception. 77-7-2, U.C.A.; State v. Hamilton, 710 P.2d 174 (Utah, 1985); 77-9-1, et seq., U.C.A.

c. Exigent Circumstances. The discussion below sets out the exigent circumstance element of this two-prong test. None are present. Further, the second prong is the pre-existence of probable cause. Under no circumstance can it be argued that probable cause preceded the entry. (See probable cause argument, infra.)

Since no exception to the warrant requirement is present, the entry onto private property to search and question is the original taint and all subsequent evidence is inadmissible. The arrest is also unlawful and the case should be dismissed.

2. THE QUESTIONING OF APPELLANT WAS NOT BASED UPON REASONABLE SUSPICION AND THE EVIDENCE DERIVED THEREFROM IS TAINTED

Assuming arguendo that the entry onto the private property was lawful, then the next level of intrusion is the point of taint.

At 77-7-15 and 16, U.C.A., is found the codification of the "stop and frisk" holding in Terry v. Ohio, 392 U.S. 1 (1968).

Simply put, 77-7-15 forbids an officer from even questioning a person unless:

a. He is in a public place, and

b. The officer can articulate specific facts which demonstrate "reasonable suspicion" that the suspect has committed or is committing a crime.

Even where the stop is lawful due to pre-existing reasonable suspicion, the officer may only ask for "name, address and explanation of actions".

The Terry test falls grossly short for several reasons:

a. No public place.

b. Those facts articulated by this officer do not rise to the level of "reasonable suspicion," therefore no questions were permissible. The suspicion was based upon a dispatcher's triple hearsay report of a "possible drunk driver," the statement of a private citizen-informant of unknown credibility that Appellant drove erratically, the odor of alcohol 30 to 50 minutes

after the fact and certain vague "admissions" by Appellant of driving at an earlier time.

In State v. Swanigan, 699 P.2d 718 (1985), the Utah Supreme Court reversed a conviction where a Terry-stop was based on "mere" suspicion or "hunch" rather than "reasonable suspicion". The suspicion in that case was based upon a description of the suspect provided by a fellow officer who had not personally observed the criminal activity, but saw the suspects walking near the scene of recent burglaries at a late hour.

c. Even if Russo's then-known facts permitted a Terry-stop, his questions exceeded the permissible statutory scope in that the only ones asked were directed at the two elements of the crime, i.e., "were you drinking. Were you driving." The probe continued into the demand for performance of agility tests, hardly "an explanation of his actions".

The stop/questioning therefore was unlawful and all evidence thereafter derived should have been suppressed.

3. THERE WAS INSUFFICIENT PROBABLE CAUSE TO ARREST

Even if this Court finds that Russo had "reasonable suspicion" to question Appellant, it is clear that the additional facts obtained prior to the arrest were not sufficient to establish probable cause, i.e., odor of alcohol and results of agility test. (Appellant also argues, infra, that the agility test results are further tainted per Miranda, inter alia.)

The Utah Code, at 77-7-2 states, in pertinent part, that a peace officer may not arrest for a misdemeanor unless the offense is committed in his presence UNLESS he has probable cause to believe it was committed and exigent circumstances necessitate the arrest (to prevent flight, destruction of evidence, etc.)

The 1985 Utah State Legislature carried out one additional exception to 77-7-2 which is unique to no other offense other than DUI. By enacting 41-6-44(8), the code was amended to permit a warrantless arrest (for DUI only) even though the "presence" prong is absent but only where the officer has "probable cause".

Since only two elements of the instant offense are at issue, an examination of the facts giving rise to the probable cause for arrest and the nexus between the two is necessary.

41-6-44(8) clearly states that probable cause must exist both as to the element of impairment of the driver ("offense was committed") and to the actual driving at the time of the impairment by the accused, ("committed by that person") the underlying facts must still meet the due process test. The facts known to the officer at the time of arrest must be such that a detached magistrate upon the same facts would have issued a warrant. Spinelli v. United States, 393 U.S. 410 (1969); Whitely v. Warden, 401 U.S. 560 (1971).

The entire foundation for the driving pattern comes from an unknown informant who said nothing to the officer to

create a nexus with the element of impairment. Spinelli requires knowledge of the informant's credibility. At best, an angry and biased informant reported a traffic violation possibly rising to reckless driving (which requires "presence" of the officer.)

As to the element of impairment, the officer relied solely upon the odor of alcohol and field tests perceived much later. Those facts, even with Appellant's admitted drinking, only show "drinking" or "drinking and driving", neither of which are crimes, no connection being made.

The Utah Supreme Court has found an arrest to be invalid even where the officer himself observed the driving before locating and arresting the suspect at home. Olesen v. Pincock, 68 U. 507 (1926).

The reason for the constraint is clear. When the suspected crime is no longer ongoing, the impartial judicial review of the facts outweighs the public safety concerns set out in the exigent circumstances subsection.

Probable cause to arrest is restricted to facts then known and reasonable inferences to be drawn therefrom based upon an objective standard. State v. Cole, 674 P.2d 119 (Utah, 1983). The reason for a warrant, absent exigent circumstances, is to guard against violations of rights by a neutral and detached magistrate. Johnson v. United States, 333 U.S. 10 (1948). The United States Supreme Court has invalidated convictions where even warrants were issued by non-neutral magistrates or attorneys

general. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

This arrest/seizure was based upon the hearsay of an angry and biased witness as to one element and speculation (not inference) as to the nexus of belated subjective perceptions as to the other. Query: Would a reasonable judge issue a warrant based upon the facts known to Russo at the time?

Olesen, supra, holds a warrant is required due to the time passage even if the officer observed the offense hours earlier. If the 41-6-44(8) exception to presence is not limited by time constraints, then an officer can make warrantless arrests for days or months following an offense. He therefore becomes both enforcer and magistrate.

Worse, in relying upon the complaint of a citizen to formulate probable cause as to at least element, the citizen becomes the "magistrate" authorizing an officer to make an arrest.

Nevertheless, there was no probable cause to support an arrest. In its recent holding in State v. Mendoza, et al., ____ P.2d ____ (Utah, December 13, 1987), the Supreme Court found probable cause insufficient where the officers observed then stopped two Hispanics with out of state plates (fitting the "drug courier profile" in several respects) driving a vehicle in an erratic and suspicious manner. Subsequent questioning revealed

suspicious behavior. A "consent" search produced a quantity of narcotics.

In reversing Mendoza the court set a standard for probable cause greatly exceeding the articulable facts present in this case.

One option which would have removed the hear-say/credibility issue from the probable cause determination would have been to allow Mr. Mott to make a citizen's arrest pursuant to 77-7-3.

However, since the officer chose to make a warrantless arrest on these facts, the court must conclude that the arrest herein was unlawful thereby depriving the trial court of juris-diction.

At the least, if this Court finds probable cause to be lacking, the breath test results must be excluded since the law in this matter mandates that breath tests may only be adminis-tered pursuant to a lawful arrest. 41-6-44.10(2)(a); State v. Cruz, 446 P.2d 307 (Utah, 1968). Where only driving pattern testimony and admissions of drinking coupled with after-acquired "evidence" is admissible, the evidence is insufficient to support a finding of guilt beyond a reasonable doubt State v. Boyd, 692 P.2d 769 (Utah, 1984).

4. THE "ADMISSIONS" AND FIELD TEST RESULTS WERE UNCONSTITUTIONALLY OBTAINED

Even if the pre-arrest facts are found sufficient to form probable cause, certain of them must be excluded on Fifth Amendment grounds.

In short, once a suspect is subjected to custodial questioning, his responses are not admissible unless a Miranda warning has been given.

Custody is determined by that moment, after which, the suspect is no longer free to leave. Any interference with the suspect's intended freedom of movement is a detention, whether or not the officer actually restrains him or announces an arrest and even if the officer does not believe he has arrested the suspect for Miranda purposes. At that point the answers are inadmissible if prompted by the officer's questions, rather than impromptu. State v. Hamilton, 710 P.2d 174 (Utah 1985); Miranda v. Arizona, 384 U.S. 436 (1966); 77-7-6, U.C.A.

Two levels of potential Fifth Amendment violations arise under these facts.

a. Once the questioning of Appellant exceeded the scope permitted in 77-7-15 and, in fact, focused on the only two elements of the crime, Miranda should have been given. The answers, (as non-probative as they were), were prompted by questioning. It is unlikely, from this record, that Appellant could have walked away unrestricted.

b. Detention was undisputed once the Appellant was required to move to a different location and told to submit to field tests. Unless the state can argue that Appellant would have, but for the officer's prompting, walked to that location and voluntarily attempted to perform those acts, it cannot be

derived that his freedom of movement was not only altered but affirmatively scripted.

Since the tests were designed to elicit testimonial evidence of impairment and since the officer admitted that the tests were solely aimed at obtaining inculpatory evidence, the results thereof were obtained involuntarily and in violation of Appellant's Fifth (and perhaps Fourth) Amendment rights. (See Boyd v. United States, 116 U.S. 616 (1886) holding that search for what is forbidden by Fifth Amendment is unreasonable under the Fourth.

5. THE COURT BELOW ERRED IN DENYING THE MOTION TO SUPPRESS AND/OR DISMISS

The burden of proof in suppression hearings regarding warrantless searches/arrests is on the prosecution. Coolidge v. New Hampshire, 403 U.S. 443 (1971) (Part IID). Had that burden been properly applied, Appellant's motion should have been granted. The court further abused its discretion in failing to dismiss the charge at the close of the state's case at trial for the reasons argued hereinbefore.

6. SECTION 41-6-44(8) OF THE UTAH CODE IS UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED

As argued supra, the Utah arrest statute, absent exigent circumstances, prohibits a peace officer, in misdemeanor situations, from making a warrantless arrest. (77-7-2.)

The 1986 General Session of the Utah Legislature created a narrow exception to 77-7-2 by enacting 41-6-44(8); i.e., "probable cause" arrests for DUIs.

This exception was enacted as a result of the Statewide Association of Prosecutor's (SWAP) lobby which reacted to the dismissal of "hand-off" cases by trial courts in DUI prosecutions. The "hand-off" case is one where one police officer stopped a driver for suspected DUI then called a back-up officer to the scene to complete the processing and arrest; i.e., administering field sobriety tests, breath tests, etc. This procedure was primarily utilized due to the increased development of DUI "specialists" who could provide greater expertise and free up regular patrol officers for general duties.

The "hand-off" from the patrol officer to the specialist, however, resulted in the specialist making an arrest following the field tests (and other observations of impairment) but without having actually viewed the "driving" element of the crime being committed. I.e., the arresting officer was relying upon the probable cause formed by the hearsay of officer #1 that that officer had observed the driving (and that the driving pattern was of a nature to allow a legal stop of the suspect vehicle.)

Since the strict application of 77-7-2 invalidated the arrest, the charges were dismissed and the DUI-specialist programs were being jeopardized.

The arguments of prosecutors in those cases were the same as the SWAP lobbyists/proponents for 41-6-44(8); e.g., holdings of a goodly number of foreign state courts which determined that in DUI cases the "police-team" concept should

apply. The "police-team" concept is that an ongoing crime may be witnessed by the collective "presence" of more than one officer in an unbroken episode and where the arresting officer witnesses the final element(s) of the crime and relies upon the fresh "hearsay" of the other officer(s) as to earlier element(s). SWAP also cited Utah case law (non-DUI) which arguably allowed the "police-team" theory to satisfy the "presence" requirement. (Citations omitted.)

The common denominator in all "police team" cases; however, is that the hearsay is reliable <u>because it comes from another police officer</u> of known credibility who is trained to make educated observations and is but another set of eyes for the team.

Respondent will not argue that the reasoning of the successful SWAP lobbyists nor the committee debates went beyond "police-team" notions.

In other words, neither the proponents of 41-6-44(8) nor the legislative framers intended untrained, biased citizens of unknown credibility to be included in the "police team".

Further evidence of the legislative intent is found in the <u>only</u> two statutory exceptions (other than 41-6-44(8)) to the "presence" requirement of 77-7-2.

In those two instances, a peace officer may make a probable cause arrest of a person who is suspected of shoplifting

or library theft and has been contemporaneously detained by the merchant or library employee since the suspected offense and until the officer arrives. Those laws also grant civil and criminal immunity to the arrester. (See 77-6-801, et seq.; 77-7-12 through 14, U.C.A.).

None of the above statutes allow for a break in the series of events from viewing the offense, detention by the citizen-viewer (merchant or library person) and the arrest by the responding officer. If the suspect has departed, the merchant/library employee is no more than a complainant and the officer no longer has the authority to make a probable cause arrest.

A. 41-6-44(8) was Unconstitutionally Applied to Appellant.

Had the 1986 Utah legislature intended to create a vigilante force of DUI citizen-patrol officers it would have also created special legislation for detention and immunity as in the shoplifting and library theft exceptions.

Even in those exceptions, the statutory probable cause is broken, and the officer cannot arrest thereon, where, as here, the suspect is not detained or continuously viewed.

Deputy Russo perceived (and the state acquiesced to that belief) that 41-6-44(8) empowered him to make a post-crime warrantless arrest for an offense committed in the presence of a citizen. By application of that interpretation of the statute,

the law empowers the "police-citizen-team" to substitute their judgment for that of an impartial magistrate which clearly violates the doctrine of the separation of powers and thereby deprives Appellant of the due process of judicial intervention.

In the shopkeeper/librarian instance, the arresting officer can satisfy his probable cause concerns by viewing a person who is still on the premises (scene of the crime) with stolen merchandise on or near his person. He can also rely upon a person trained as a merchant or library person with particular knowledge of the stolen items.

In the instant case, the officer must rely on an untrained citizen. (Note the pages of general testimony in the trial transcript as to the extensive training of the officers in DUI detection). He must also assume that the suspect was in the same state of impairment when seen driving.

This officer has exceeded the intended application of the DUI probable cause arrest law and in so doing deprived Appellant of substantive due process rights in violation of state and federal guarantees.

B. 41-6-44(8) is Unconstitutional on its Face.

A statute is unconstitutionally vague if it gives unfettered discretion to the police as to making an arrest for its violation. Palmer v. City of Euclid, 402 U.S. 544 (1971).

41-6-44(8) allows police officers to make arrest without any restriction as to the source of the hearsay-based

probable cause or to the time constraints. Query: If citizen "A" tells an officer that citizen "B" drove a vehicle while intoxicated "two months ago", can the officer make an arrest? Or worse, can the officer wait another two months then arrest? The statute (41-6-44(8)) allows unfettered discretion, unlike the limits enumerated in the library and shoplifting exceptions. The officer may decide whether a magistrate's authority is necessary or not.

Further, the mere exception to "presence" in DUI cases is constitutionally suspect. Whenever due process is intruded upon, the issue of equal protection arises. To uphold such an exception to the warrant requirement, the court must weigh the due process rights of individuals against the needs of the state. To pass constitutional muster the court must find the exception to 77-7-2 to bear a "fair and substantial relationship to legitimate state ends". (See Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

It is clearly a legitimate state end to enforce DUI laws. Does DUI enforcement, however, rise to the level that the letter of the law allows for the only unrestricted "probable cause" arrest for a misdemeanor offense in Utah? The Utah Code classifies scores of misdemeanors as class "A" offenses, strictly defined as greater offenses than DUIs, (class "B"). Negligent homicide, assault on a police officer, child abuse, theft and a number of crimes against persons, including sex offenses are

misdemeanors - yet none can be the subject of an unrestricted, non-presence, "probable cause" arrest. Only DUI.

Absent statutory language placing constraints upon the arresting officer's discretion as to facts, time and circumstances, 41-6-44(8) is unconstitutionally vague and its legitimacy weighs less than the due process rights it invades.

CONCLUSION

This Court should find that the pre-arrest evidence obtained from Appellant was inadmissible in whole or in part owing to the unlawful detention, questioning and arrest of Appellant and that there was insufficient probable cause for said arrest.

Further the statute which gave the officer the authority to arrest Appellant on probable cause alone is unconstitutional on its face and as applied herein.

This Court should reverse the conviction below and remand this case back to the trial court for dismissal or such other relief consistent with the court's ruling.

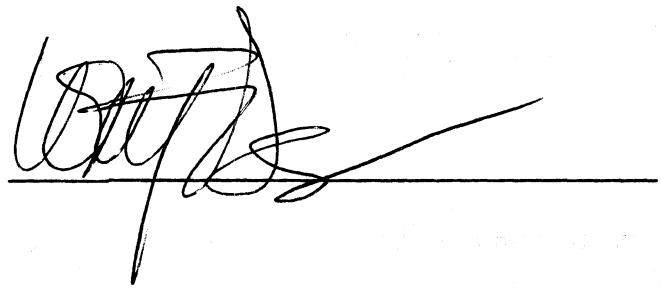
DATED this 8 day of January, 1988.

LONI F. DeLAND
Attorney for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8 day of January, 1988, a true and correct copy of the foregoing was mailed, with

postage prepaid fully thereon, to Roger Blaylock, Salt Lake County Attorney's Office, 2001 South State, Room S3700, Salt Lake City, Utah 84190-1200.



ADDENDUM TO APPELLANT'S BRIEF

A About 11:00.

Q What happened then?

A Was eastbound on 45th South, traveling about 40 miles an hour, and I saw the defendant's pickup truck in the emergency lane of 45th South, and it appeared, as I was traveling, that it was not--he had stopped, and when I was almost to him, he pulled over in front of me, from the emergency lane, crossed both lanes of traffic and went into the 7-Eleven, on the north side of the street.

Q How fast were you traveling?

A I would think 35, 40 miles an hour.

Q What--how close were you to him, or to his vehicle when--

A I was quite close, I--if he hadn't moved out of the emergency lane, I probably would have hit him. I locked my brakes and moved over into the emergency lane, to avoid colliding with him.

Q You then turned to the right as he went to the left?

A Yes. Yes.

Q What did you do after those incidents?

A I was furious that this happened, and I turned my car around and pulled into the 7-Eleven parking lot and jumped out of my car and walked around, and asked him if he realized that he just about caused an accident, and he--

Q Now, is the individual that you saw in that truck

A I don't. I remember the kind of truck.

Q What kind of truck was it?

A It was a Plymouth Arrow, yellow, and I believe it had strikes on it. I'm thinking that they were black and red; but I do remember it's yellow. Plymouth Arrow.

Q What did you do after these employees had attempted to call the police?

A Well, they eventually got ahold of the police department, and I, knowing the area well, decided that I would see if I could find him, and so we got back in the car and turned to 2900 East, going northbound and we traveled a couple of blocks, and I saw his pickup truck, parked at a corner house, just off 2900 East.

Q Do you know what the address was there?

A I believe that is La--a street called Lagoya, L-a-g-o-y-a, and their address would be on Lagoya, their house is facing Lagoya, and corners onto 2900 East.

Q What happened then?

A Well, we took down the address, and we went home. We have two-year-old twins and a babysitter, and we went home and got our children, put them in the car--oh, we called the police from our home and told them the address, the exact address of where we had spotted the truck. And then after taking the babysitter home, went down to that address and the police were already there.

Q What time was that?

A I would imagine around 11:20, 11:30.

Q So, this whole sequence of events up to this point where you were there with the police took about how long, then?

A I never spoke to the police. I was in the car with my children and--and my husband got out. But I was there--we were there probably a half hour, and finally, we left. The police were still there, but we left before. It was close to midnight.

Q Okay. But apparently I didn't state that very well. But the time, how long had it taken since you had first seen the car, when it pulled in front of you--

A Uh huh.

Q Until you were there at that address and the police had arrived?

A Approximately 30 minutes.

Q About 30 minutes?

A Uh huh.

Q And then you were there another--

A Another 30 minutes, as well.

Q --30 minutes?

A At his address.

Q And were there other people there at the time that you arrived, besides the defendant?

A At his home?

Q Yes.

A Uh huh. That's correct.

Q And then you came and you talked to him through the window of his vehicle; is that right?

A I believe his window was down.

Q But you're not sure of it?

A I could--no, not positive.

Q And you observed that he was glassy-eyed?

A Uh huh, yes.

Q And unresponsive?

A Right.

Q And then the third thing is that he had difficulty leaving the lot, in that he drove into some railroad ties?

A Yes. He backed into--

Q Did you make any--did you make any statements, written statements or reports or notes or anything of that--

A No. I did not.

Q I see. Did you tell the police officers that evening that he drove into those railroad ties?

A Yes--well, I can't say that, no; because my husband is the one that spoke with them, on the telephone and at his home.

Q All right. So, you made no such--

A No. No.

Q --statement?

A We--we did jot down his license plate number.

A Yeah. We were going eastbound on 45th South and about 29th East, saw a car parked off--looked maybe going five miles an hour, off in the right-hand lane. We were going eastbound, thought nothing of it, all of a sudden, he pulled out going into a 7-Eleven. My wife had to lock the brakes, we came within about two feet of hitting him broadside. I, at that time--we--it made us so mad, because we had to lock the brakes, we pulled in right next to him, we pulled in on his left. I got out, saying what are you trying to do, cause an accident.

Q Yeah. If you'd sit and then I'll ask you questions and you can respond to questions.

A Okay.

Q How did he respond to that question that you put to him?

A Did not really respond, just kind of a mumbled voice.

Q What happened then?

A Well, we got out, he had a little yellow pickup truck, I noticed in the back of his pickup truck two six-packs that were empty, as well as what appeared to be a whiskey bottle that was about half empty.

Q What happened then?

A At which time, I asked him, I said, are you drunk?

Q Did he respond to that?

A He did not respond. He was kind of glassy-eyed, saying, a-h-h-h-h. At which time, I said, I'm going to call the

you observe him do?

A Okay. At which time, he--all the cars were parked at 7-Eleven, at which time, he backed up in kind of a 90-degree angle backing up, hit the retaining wall, which is one of these railroad tie things, with his back bumper. At which time, he took off at a fast rate of speed, looked like he was about to drop the transmission the way he pulled out, out onto 45th South, did not even observe to see if there was any traffic coming down the hill.

Q Now, you say he didn't observe to see if there was any traffic?

A He just pulled straight out, no stop whatsoever.

Q Any hesitation before he pulled onto the road?

A Nothing.

Q What did you then do?

A At which time, I was in 7-Eleven, my wife was outside, I said, better call the sheriff. He took off--as I said, he took off, the 7-Eleven guy had to pull some card out to have the phone work, called the sheriff, my wife was outside noticing--trying to find out where he took off to. At which time, he went down the street right below, which is 29th East, took off going north.

At which time, my wife and I both got in the car, we were driving along 29th East, though, hey, maybe we'll find something, but you know, not really anticipating finding anything.

that you earlier observed driving the vehicle?

A Yes. The sheriff asked me, saying, well, there's a question as to who was dri--

Q Well--

MR. DeLAND: I'll ob--

Q (By Mr. Blaylock) --don't say what he said; what did you tell the sheriff?

A I said, yeah, I says, the guy's right back near the garage, which was the--

Q Did you point out who you meant?

A Yes. I said it's that guy right near the garage. From the garage to the front property line is probably 40, 50 feet; whatever the length of a driveway would be.

Q Was there any question in your mind as to who--

A No question. Absolutely no question.

Q What did you then do?

A I told the sheriff, I said, it's that guy right over there.

Q After you'd explained that--

A Yes.

Q --you pointed out the individual?

A Yes.

Q Did you do anything further?

A He said, can you--

Q No. Did you do anything further?

night, and he stated no, he hadn't been. We asked him if--who else had, and he stated that one of the other guys had been out driving, had been to the 7-Eleven.

Q And did the individual that they pointed out as being the "other guy", was that the defendant?

A That was the defendant, yes.

Q What happened then?

A At that time, Deputy Russo more or less took over the--you know, asked him questions, we started talking with the others. Another deputy had arrived in that time, too, and so we just more or less was talking to the others, getting information from them. Deputy Russo started talking to him, asking--I guess asking him if he'd been drinking and that.

Q Did--do you know the two individuals that testified just previously?

A I--

Q Have you seen them before?

A Okay. I was told who they were, and they drove up in a car later on, and I didn't--didn't get that good of a glance at them, no.

Q I see.

A But I know who they are, now.

Q I see. You did see them then later at that location?

A Yes.

MR. BLAYLOCK: I'd have no further questions.

MR. DeLAND: I have no questions. No questions, your Honor.

THE COURT: Would you wait outside, sir?

THE WITNESS: Yes.

MR. BLAYLOCK: May he be excused?

MR. DeLAND: I have no objection.

THE COURT: You may be excused, sir.

THE WITNESS: Thank you, your Honor.

E. ROBBIE RUSSO,

called as a witness by and on behalf of the State in this matter, after having been first duly sworn, was examined and testified as follows:

THE COURT: Take the stand, sir.

DIRECT EXAMINATION

BY MR. BLAYLOCK:

Q What is your name?

A E. Robbie Russo.

Q How are you employed?

A Deputy Sheriff, Salt Lake County.

Q How long have you been with the sheriff's department?

A About two-and-a-half years.

Q Were you working for the sheriff's department October 4th last year?

A Yes. I was.

Q About 11:30, some time after 11:00, did you receive a

call about a possible drunk driver?

A Yes, sir. I did.

Q And what did you do when you received that call?

A I responded to the initial scene of occurrence, which was 2931 East 4433 South.

Q And what's located at that address?

A There's a 7-Eleven convenience store at that address.

Q 2931 East 4430 South?

A Yes. It's right on 4500 South, but the actual address is 4430.

Q Did you receive any further updates or information?

A Yes. I did.

Q And what was that?

A The suspect vehicle that was described apparently had been stopped by Deputy Orton at another address that was close by.

Q Did you respond then to a different address?

A Yes. I did.

Q What was that?

A *That address is 2889 Lajoya.*

Q How is that spelled?

A I believe it's L-a-capital J-o-y-a.

Q Did you then go to that area?

A Yes, sir. I did.

Q What did you find at that area?

A I found the suspect vehicle parked at that address, with some individuals, outside.

Q And by the suspect vehicle, would you describe that vehicle?

A The vehicle is a 1980 yellow Plymouth pickup truck. Do you want the license number?

Q Yeah. What was the license number?

A LF 4837.

Q And where did you get that license number?

A That was given by the original complainant.

Q I mean where did you receive it?

A I'm sorry. I don't understand the question.

Q Where did you get the license number; was that given to you by dispatch?

A Yes. It was.

Q Or was that given to you by another deputy or--

A It was given over the air, by dispatch.

Q --over the air? Who had the primary responsibility for this investigation?

A Yes, sir.

Q You did?

A Yes.

Q Okay. What did you do then after you arrived at that area and saw the vehicle?

A I asked whose vehicle it was an an individual stepped

forward.

Q Was that person ever identified to you?

A Yes. He was.

Q As who?

A As Brian Scoffield.

Q What did he say to you?

A He told me that he was driving the truck.

Q What did you do after he said he was driving the truck?

A Asked him to present his identification and began to interview him.

Q Now, was the defendant there at that time?

A Yes, he was.

Q Where was he in relationship to Mr. Scoffield?

A He was--

Q Was he close or far away?

A He was standing about halfway in the--halfway back in the driveway.

Q About how many feet away was he?

A Oh, about 20 feet.

Q Was he in a position where he could hear what you asked, who was driving?

A Oh, yes.

Q Did he respond to that question at all?

A No.

Q Now, you asked Mr. Scoffield for his I.D. and other

information?

A Yes, sir.

Q What happened then?

A The original complainant pulled up and identified himself to me.

Q And who was that?

A Roger Mott.

Q Has he already testified today? Have you seen him earlier today?

A I've seen him in the courtroom, yes.

Q What did he tell you?

A He told me that he and his wife--he gave me an explanation of what had transpired and why he had called, but then he came up and he said, you have the wrong person who was driving the car, and he pointed out the defendant.

Q And he pointed at the defendant?

A Yes.

Q And the individual that he identified, is that person present in the courtroom today?

A Yes, he is. He's seated at the defendant's table with the dark hair and light colored suit.

MR. BLAYLOCK: May the record show the identification of the defendant, your Honor?

THE COURT: It will.

MR. BLAYLOCK: Thank you.

Q (By Mr. Blaylock) Did you have any conversation with Mr. Scoffield then, as a result of what he's previously told you?

A No. The other officer spoke with him, and my attention was drawn towards the defendant.

Q What did you then do?

A Asked the defendant for his identification.

Q Did he present it?

A Yes.

Q And what was the name?

A Brady C. Bullock, it was a California driver's license.

Q Did you notice anything about him as you were conversing with him?

A Yes. I did.

Q What?

A That I could detect a moderate odor of alcohol about his person.

Q And when you pulled up, you indicated that there were people standing around there; do you know approximately how many?

A It would be a guess, I couldn't say for sure how many other people were there. I--it's--I don't remember.

Q Did you observe any of them to have beer or alcohol or any kind?

A None that I recall.

Q Is that something that you would have observed?

A Yes.

Q Did you observe whether Mr. Bullock, the defendant, had any beer or alcohol at the time you arrived?

A No.

Q Now, when did you--do you recall when you first received the message from dispatch?

A It was approximately at 2350, which is ten minutes to midnight.

Q And is that when you arrived or when you received the call?

A We had actually received two different calls.

Q I see.

A So, I was already in the area when we got the second call and the other deputy found the suspect vehicle.

Q The call at 2350, was that the first or the second call?

A I believe that's the first call that I have listed.

Q Okay. How long did it take you to respond, do you have any idea?

A Yes. Because I was already at the 7-Eleven, this LaJoya is only a couple blocks away, so it was just a minute.

Q Fairly close, there?

A Yes, sir.

Q Now, you asked Mr. Bullock for his I.D. What did you do then?

A I had asked him if he had been drinking and in fact if he was the one that was driving the car.

Q How did he respond?

A He told me that he had had just three beers and that yes, he was driving the truck.

Q What did you do then?

A Asked him to submit--or perform some field sobriety tests.

Q What's a field sobriety tests?

A They're a group of standardized tests that individuals perform to determine their level of impairment, if any.

Q Have you had any training with regards to driving under the influence cases?

A Yes. I have.

Q What training is that?

A You receive a standardized set of training from the Police Officers Standards and Training in initial academy; however, I--

Q How many hours is that, do you recall?

A I don't recall exactly how many were involved in that.

Q For a few days? A week? Don't have any idea?

A I couldn't say.

Q All right.

A I have, since, taken other further classes and for certification of intoxilyzer testing and recertification and one

Q What was your opinion?

A My opinion was that he was impaired.

Q Now, by impaired, do you mean that he was falling-down drunk?

A No, sir.

Q What would be your--what's the difference between impairment and falling-down drunk, as you understand it?

A An impairment would be someone who is rendered incapable of safely--in this case, safely driving a motor vehicle. A drunk, you have the typical sloppy drunk who falls down; that's a higher level or degree of intoxication.

Q By impaired, how would that relate to his ability to operate a motor vehicle?

A He would not be able to do so safely.

Q After the field sobriety tests, what did you do?

A Advised him that I believed he was impaired and I was placing him under arrest for driving under the influence of alcohol.

Q What action did you then take?

A I asked him if he would--was willing to submit to a chemical test to determine the blood alcohol content of his breath.

Q What did he say?

A He submitted to it.

Q So, what did you do, as far as that procedure?

A I gave a copy of the results to the defendant and then I kept the rest and placed it into evidence.

Q Now, was the result that you obtained consistent with your visual observations of the defendant?

A Yes.

Q Did you have anything further, after placing these items into evidence, did you do anything further?

A I transported the defendant to jail at that point.

MR. BLAYLOCK: I'd have no further questions of this witness.

CROSS-EXAMINATION

BY MR. DeLAND:

Q Deputy Russo, it's a little unusual, isn't it, that you drive into a residential neighborhood and pull up and ask somebody to do these field tests in a driveway?

A Yes.

Q Typically, on a drunk driving arrest, what you do is you either have an accident you're investigating or you make observation of a driving pattern and you make a stop?

A Yes, sir. That's correct.

Q And so in this case, what you were doing, you were substituting the judgment of civilian witnesses for that of an officer for a driving pattern; isn't that right?

A Yes, sir.

Q Because you didn't have an accident?

A That's correct.

Q And so your decision to ask my client to take the field tests and so forth, you relied on the credibility of those witnesses, didn't you?

A Partially. And my observations.

Q After you got there; but you wouldn't have been there without the credibility of those witnesses playing a part, would you?

A No.

Q Because you never saw my client drive the vehicle?

A That's correct.

Q And as a matter of fact, the observations you made about sobriety or lack thereof, were based upon the short period of time after any actual driving may have taken place; isn't that right?

A That's correct.

Q Now, you--you took training, you've told us, on more than one occasion, in identifying the drinking driver?

A Yes.

Q And part of that training, is it not, to learn about the cumulative effects of alcohol on the system, on a driver?

A Yes.

Q And so you know that if I sat here and I drank three beers, the first little while, I'd seem pretty normal, wouldn't I? The first few minutes?

A Yes.

Q Later on, that would make my blood alcohol level rise and I might start reaching the level of impairment; isn't that true?

A That's correct.

Q Okay. And so when you observe a person after having consumed an amount of alcohol sufficient to impair them, it's important as to when, in relation to when they drank that alcohol that you make that observation, isn't it?

A Yes.

Q You--did you receive any recorded or written statement from the Motts, either of them?

A No.

Q I think you spoke primarily with Mr. Mott, didn't you?

A That's correct.

Q And I take it you put everything in your report that they told you?

A A summation.

Q In substance. And essentially, they indicated that my client, personally identified as my client, pulled out in front of them; is that right?

A That's correct.

Q Pulled into a 7-Eleven?

A Yes.

Q And they were quite angry about that?

A They were that and visually shak--or yeah, shaken.

Q Yeah. Did Mr. Mott tell you about a bottle of whiskey he saw?

A In the vehicle, or--

Q Yeah.

A --on--no.

Q Did he tell you about a couple of six packs of beer he saw?

A No.

Q You only, when you asked my client to take a breath test, you only had him take one test, didn't you?

A That's correct.

Q And when you asked him to take the field tests, you asked him to take them out there in the driveway of this home on LaJoya?

A That's correct.

Q And you know that driveway of that home on LaJoya is not level, it's sloped, isn't it?

A Part of it, that's why I went out to the bottom where it was flat.

Q Are you saying it's not sloped on the bottom?

A Pardon me?

Q Are you saying it's not sloped?

A I found a--I wanted--he was--he came up and he talked to me at the street. In all fairness, I took him to a flat,

also, and that was to Mr. Scoffield, were you driving that evening, words to that effect?

A Yes.

Q All right. He said yes, he was?

A He said he was--he was driving it, yes.

Q Prior to him taking these field tests, my client, the field sobriety tests where he's walking around in the driveway, you had basically what these witnesses had told you?

A That's right.

Q And what my client had--you'd smelled his breath and he'd answered a couple of questions for you; right?

A Correct.

Q You asked him to do these field tests?

A Yes.

Q Did you advise him of his right to remain silent, his right to have counsel present, any of those things, before you had him take those tests?

A I was still conducting an investigation, so I did not.

Q So, he was not told that he had a right not to take those tests, was he?

A No.

Q He's not--there's no requirement that he takes those tests, are there?

MR. BLAYLOCK: Your Honor, could we approach the bench?

THE COURT: You may.

(Whereupon, an off-the-record discussion was held at side bar.)

Q (By Mr. DeLand) I don't recall if you answered the last question. The question was, there's no requirement that a person take your field sobriety tests, is there?

A No, sir.

Q And in fact what you were doing was, you'd gathered evidence that you've now told the jury about, by taking those tests; isn't that right?

A Yes.

Q Did you search the ~~trust~~ truck after the arrest?

A I did not, no.

Q Do you know who did?

A I believe it was Deputy Orton.

Q Okay. There's no--there's no evidence, there's nothing that's been placed in the evidence room, was there?

A No.

Q Nothing unusual about the truck?

A No.

Q There was no damage to the truck, was there?

A I told you I didn't check it.

Q Well, do you know from any of the reports?

A None. None listed on my report, no.

Q And you've told us now, you've told the jury that in your opinion, at the time you saw my client, he was impaired; is